Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

LARRY MILTON,

Petitioner,

vs.

THOMAS HELLER, Individually and in his official capacity as Police Officer,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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37 pp

QUESTIONS PRESENTED

This case presents the following questions for review:

1. Whether, where Petitioner prevailed in a moral victory and won nominal damages in his 42 U.S.C. Section 1983 lawsuit against a police officer for excessive force and battery, the District Court abused its discretion pursuant to 42 U.S.C. Section 1988 in denying attorney fees.

2. Whether the District Court abused its discretion pursuant to 42 U.S.C. Section 1988 in offsetting Petitioner's costs as a prevailing party against those of Respondent, based on Petitioner's "nominal victory" and disproportionate result relative to taxable costs of the litigation.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is contained in Appendix A.

The Ruling of the United States District Court for the Southern District of Iowa Denying Application for Attorney Fees and Costs is contained in Appendix B.

The Order of the United States Court of Appeals for the Eighth Circuit Denying Petition for Rehearing and Suggestion for Rehearing En Banc is contained in Appendix C.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit, hereafter "Eighth Circuit," filed judgment February 8, 1995. On February 23, 1995, the Eighth Circuit granted a motion for an extension of time until February 28, 1995, to file a petition for rehearing. The Court denied a Petition for Rehearing and Suggestion for Rehearing En Banc March 27, 1995.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). Certiorari review is appropriate because the Eighth Circuit has rendered a decision in conflict with the decision of this Court in *Farrar v. Hobby*, 506 U.S. ___, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992). Certiorari review is further appropriate to decide constitutional questions of great import and exceptional public interest as regard the inevitable deterrent effect of the Eighth Circuit's decision on the pursuit by attorneys of the legitimate civil rights claims of their indigent clients.

If the decision is not reversed, poor persons with meritorious claims against the government will be denied constitutionally guaranteed access to our justice system.

STATUTORY PROVISIONS

42 U.S.C. Section 1988(b) (1994):

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. §1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. §2000bb et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. §2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

Jurisdiction of the District Court for the Southern District of Iowa was pursuant to 28 U.S.C. Section 1343(3). Jurisdiction of the Eighth Circuit was based on 28 U.S.C. Section 1291.

On December 28, 1991, Petitioner, an African-American, was arrested by police officers for the City of Des Moines, Iowa. During the arrest, officers beat Petitioner so severely he required 24 staples in his head and hospitalization.

On April 3, 1992, Petitioner filed a Complaint against the City of Des Moines and the three arresting officers: Sergeant Joanne Pollock, Thomas Heller and Stephen Strawser. He brought the following claims: (1) under 42 U.S.C. Section 1983 against the officers for use of excessive force in violation of his constitutional rights; (2) under 42 U.S.C. Section 1983 against the City of Des Moines for maintaining a pattern and practice of allowing police officers to use flashlights as weapons, and failing to properly train and supervise officers by allowing them to use flashlights as weapons; (3) for negligence per se against the officers and City of Des Moines for violations of Des Moines Police Department Regulations, by using unnecessary force and by using an unauthorized auxiliary weapon, namely a flashlight; and (4) for assault and battery, directly against the officers, and against the City of Des Moines for statutory liability as employer of the officers. In addition, Petitioner joined a claim for disclosure of his medical records against the hospital at which he was treated. The hospital, Broadlawns Medical Center, settled with Petitioner and was subsequently dismissed.

Prior to trial, Defendants were granted summary judgment on the negligence claims and Petitioner dismissed punitive damage claims for strategic purposes. The claims against the City were bifurcated.

Trial occurred on the claims against the three police officers of excessive force and battery. Officer Thomas Heller was found liable on each count. It found Officer Heller violated Petitioner's constitutional rights under 42 U.S.C. Section 1983 by using excessive force, that he committed battery against Petitioner, that the battery was

not justified and that Officer Heller's actions were a proximate cause of Petitioner's injuries. The remaining Defendants were found not liable. The jury assessed an award of one dollar in damages.

Following the verdict, on December 30, 1993, Petitioner filed an application for attorney fees and costs, originally in the amount of $79,000, pursuant to 42 U.S.C. Section 1988(b). Defendant Heller filed a resistance to the application on January 10, 1994. On February 1, 1994, the District Court denied Petitioner's application. Appendix B.

Timely Notice of Appeal to the Eighth Circuit was filed February 17, 1994. On February 8, 1995, Judges Wollman, Heaney and Hansen issued a decision affirming the district court's denial of Petitioner's application for fees and costs. Appendix A. The panel held that while it might not have reached the district court's decision, the district court did not abuse its discretion in making the fee determination where it considered all relevant factors. Likewise, regarding the award of costs, the panel held that the district court did not abuse its discretion in that it considered all relevant factors. Rehearing and Suggestion for Rehearing En Banc was denied March 27, 1995, with Judges McMillian and Morris Sheppard Arnold indicating they would grant rehearing. Petitioner here seeks certiorari review of the Eighth Circuit's decision.

ARGUMENT

I. WHERE PETITIONER'S GOAL WAS VINDICATION OF HIS CONSTITUTIONAL RIGHTS AND THE JURY CLEARLY DETERMINED THOSE RIGHTS HAD BEEN VIOLATED, THE AWARD OF NOMINAL MONETARY RELIEF DID NOT CONSTITUTE A NOMINAL VICTORY WARRANTING DENIAL OF ATTORNEY FEES UNDER *FARRAR v. HOBBY*, 506 U.S. ___, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992).

To effectuate the interests of civil rights litigation, Congress, in the Civil Rights Attorney's Fees Award Act of 1976, authorized the federal courts to award a reasonable attorney's fee to a prevailing party:

> In any action or proceeding to enforce a provision of section[] . . . 1983 . . . of this title, the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs.

Title 42 U.S.C. Section 1988, as amended. While an award of attorney fees under Section 1988 is discretionary, a party who successfully vindicates protected rights "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968) (per curiam); see also *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524 (9th Cir. 1993), *as amended, cert. denied*, 114 S.Ct. 1537, 128 L.Ed.2d 190 (courts are expected to award such fees to a prevailing party unless some special circumstance exists to justify the court's denial).

A plaintiff "prevails" for purposes of Section 1988 when actual relief on the merits of his claim "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby*, 505 U.S. ___, 113 S.Ct. 566, 573, 121 L.Ed.2d 494 (1992). Material alteration occurs when the plaintiff becomes entitled to enforce a judgment against the defendant. *Farrar*, 113 S.Ct. at 574. A plaintiff who wins even nominal damages is nonetheless a prevailing party under Section 1988, since demand for payment of nominal damages may be made no less than for millions of dollars. *Farrar*, 113 S.Ct. at 573. Petitioner here obtained an enforceable judgment of one dollar, and is therefore a prevailing party, vis-a-vis Officer Heller, within the meaning of Section 1988.

Once a plaintiff is established as a prevailing party, the reasonableness of a fee award pends on the degree of the plaintiff's overall success. *Farrar*, 113 S.Ct. at 574 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)). An enforceable judgment alone is not always enough to guarantee an award. *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792, 109 S.Ct. 1486, 1493, 103 L.Ed.2d 866 (1989). In *Farrar*, for example, this Court affirmed denial of attorney fees under Section 1988 where the petitioners received nominal damages of one dollar on a claim of 17 million dollars, noting the litigation accomplished little beyond giving the petitioners the moral satisfaction of knowing their rights had been vindicated. *Farrar*, 113 S.Ct. at 574. *Farrar* involved the redress of a private injury – the State of Texas sought to close Mr. Farrar's school for delinquents after the death of a juvenile, allegedly the result of poor care.

While *Farrar* establishes a district court should give primary consideration to the degree of success achieved when determining whether to award attorney fees, nothing in *Farrar* suggests district courts may never award fees to a party recovering only nominal damages. *Wilcox v. City of Reno,* 42 F.3d 550 (9th Cir. 1944). A nominal award does not necessarily a nominal victory make. *Farrar,* 113 S.Ct. at 578 (O'Connor J., concurring); see also *Parton v. GTE North, Inc.,* 971 F.2d 150, 155 (8th Cir. 1992); *Domegan v. Ponte,* 972 F.2d 401, 407 (1st Cir. 1992); *Ruggiero v. Krzeminski,* 928 F.2d 558, 564 (2d Cir. 1991); *Estate of Borst v. O'Brien,* 979 F.2d 511, 515 (7th Cir. 1992); *Allen v. Higgins,* 902 F.2d 682, 684 (8th Cir. 1990); and *Romberg v. Nichols,* 970 F.2d 512 (9th Cir. 1992). Even where no actual damages are proved, an award of nominal damages can represent a victory in the sense of vindicating rights. *Carey v. Piphus,* 435 U.S. 247, 254, 98 S.Ct. 1042, 1047, 55 L.Ed.2d 252 (1978).

In *Koopman v. Water Dist. No. 1,* 41 F.3d 1417 (10th Cir. 1994), the court ruled that a public employee was entitled to a reduced attorney fee award for his successful suit alleging denial of due process in his termination, even though the employee was awarded only nominal damages of one dollar, since the employee's victory had significant implications in establishing basic rights for public employees with similar property interests. The court distinguished Koopman's suit from *Farrar,* stating "Farrar's suit could not fairly be said to have any prospect of benefiting anyone other than Farrar. Koopman's victory, like Farrar's, did little for him personally, but in sharp contrast to Farrar's had significant implications in

establishing basic rights for public employees holding a similar property interest." *Koopman*, 41 F.3d at 1420.

Milton's victory too, like Koopman's, has significant implications in establishing basic rights, including the right to be free from the use of excessive force by a police officer. And as with *Koopman*, Milton's is not the kind of case *Farrar* was intended to discourage:

> *It does not appear to us this is the kind of case Farrar was intended to discourage attorneys from taking.* It is true Koopman was not successful in proving he was damaged, but we do not believe he and his attorney should bear the entire cost of battling the District's unconstitutional practices. *Deterring meritorious lawsuits on constitutional issues because they offer a small likelihood of a significant money judgment presents as grave a danger to our legal system as frivolous litigation.*

Koopman v. Water Dist. No. 1, 41 F.3d 1417, 1421 (10th Cir. 1994) (emphasis added).

Vindication of Petitioner's constitutional rights was his most important goal – a goal he achieved. Vindication of key civil rights alone can be a true victory, justifying an award of attorney's fees. See *Nephew v. City of Aurora*, 830 F.2d 1547 (10th Cir. 1987) (en banc), *cert. denied*, 485 U.S. 976, 108 S.Ct. 1269, 99 L.Ed.2d 481 (1988), (where the most important aspect of a judgment was the vindication of the plaintiff's civil rights, an award of attorney's fees was appropriate despite a nominal damage award); and *Carey v. Piphus*, 435 U.S. 247, 254, 98 S.Ct. 1042, 1047, 55 L.Ed.2d 252 (1978). A plaintiff who obtains relief in a civil rights lawsuit "does so not for himself alone but also as a

'private attorney general,' vindicating a policy the Congress considered of the highest importance." *City of Riverside v. Rivera*, 477 U.S. 561, 575, 106 S.Ct. 2686, 2694, 91 L.Ed.2d 466 (1986) (citations omitted). "[S]ince civil rights suits 'seek to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms,' the benefit derived is not directly related to the damages recovered." *Fletcher v. O'Donnell*, 729 F.Supp. 422 (E.D.Pa. 1990), quoting *City of Riverside v. Rivera*, 477 U.S. 561, 574, 106 S.Ct. 2686, 2694, 91 L.Ed.2d 466 (1986); see also *Romberg v. Nichols*, 970 F.2d 512, 519 (9th Cir. 1992).

The social benefit element is particularly important in a claim of excessive force, where the rights involved and the abuses alleged are of a paramount concern not only to the individual plaintiff, but to all citizens. See *Gomez v. Gates*, 804 F.Supp. 69, 76 (C.D. Cal. 1992). Whereas the petitioner in *Farrar* sought redress of a private injury, the relief sought by Petitioner here evinced a significant public purpose, as evidenced by the unprecedented public debate and demands for policy reform generated by the case:

> The public uproar over the alleged mistreatment of a Des Moines man by police could spark changes in state laws governing investigations of police conduct. Key lawmakers in the Iowa House said Monday that the incident is likely to revive legislation giving civilians a role in police department reviews of complaints against officers. . . . "Any time an incident like that occurs it adds more impetus to reviewing what you currently have in place," said [Robert] Dvorsky, a Coralville Democrat. . . . Supporters of a House bill last year that attempted to address

> the issue say they will try to resurrect that proposal or develop an alternative to increase civilian oversight. . . . *"The Milton case is the impetus for legislators in this state to see that a citizen could be abused and that there needs to be an adequate and sincere effort on the part of the cities to handle the questions and complaints* that people may have about the handling of a case," said Rep. Jack Hatch, D – Des Moines. The starting point for this year's debate may be a bill defeated 53-45 by the House during the 1991 session that would have required Iowa's nine largest cities to establish internal affairs departments."

Des Moines Register, Jan. 14, 1992, at B-1 (emphasis added).

> For much of Des Moines, the Larry Milton civil trial that begins today is more than lawyers arguing in a federal courtroom – *it is a forum for a debate over alleged brutality* by Des Moines police. Almost two years have passed since *images of Milton's bruised face made his name synonymous with calls for a civilian board to review use of force by police. . . .* [W]elcoming the trial was Kalonji Saadiq, an outspoken advocate for the establishment of a civilian board to review police cases in which police officers use force. Saadiq said he is optimistic that Milton will win his law suit. But more importantly, he said, he was glad the issue of alleged excessive force would be debated publicly. *"Whenever there is systemic change, it seems that a very human situation like Larry Milton's brings it about. So I hope this can be a catalyst for systemic change and for citizens' review,"* he said.

Des Moines Register, Dec. 9, 1993, at M-1 (emphasis added). Petitioner's suit, like Rodney King's, stimulated important public debate.

Notwithstanding the unprecedented public interest generated by Petitioner's suit, the District Court concluded that the verdict in his favor was of no great public significance. The message is "important," the Court said, "and should not be lost on any law enforcement officer. Excessive force may not be used on any citizens regardless [of] what may be their race, religion, national origin, or other personal characteristics. But that message is not new. The City of Des Moines itself has been required to pay persons injured by excessive force used by its officers after arresting persons. . . . " Ruling, Appendix p. B-4. The District Court decided the significance of the verdict based simply on its want of novelty. It ignored a continuing pattern among officers of excessive force, self-evident in the verdict against Officer Heller, and the fact that the verdict's message, while it may not have been new, had been forgotten or disregarded and needed repeating.

The District Court is best situated to ascribe the reasonable value of the lawyering it has witnessed and the results that lawyering has achieved. *Wilcox*, 42 F.3d at 555 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 75 L.Ed.2d 40 (1983)). Here, the District Court stated in its ruling that "[w]ithout question plaintiff's counsel prepared this case well and presented it effectively to the jury. Plaintiff and other persons in his firm performed the services listed in his itemized statement and incurred the expenses there itemized. The affidavits

presented in support of plaintiff's application for attorney fees correctly emphasize the formidable task plaintiff's attorney faced. . . . " Ruling, Appendix p. B-5. While acknowledging counsel's effective lawyering, the District Court ignored entirely the significant results achieved through that lawyering.

The Ninth Circuit in *Wilcox v. City of Reno*, 42 F.3d 550 (9th Cir. 1994), affirmed the award of attorney fees to an arrestee who was awarded one dollar in nominal damages in an action against the city after a police officer punched him in the face. Success in the case, the court said, was indicated by the fact that counsel for the arrestee expended significant time and energy litigating the case against a resistant city, despite the fact that the client, who was shown to the jury on video drunk, abusive, and uncooperative, was unsympathetic.

Counsel in the present case, likewise, took on an unsympathetic client and expended significant time and energy litigating his case against serious obstacles, including a resistant city, Petitioner's prior criminal record, and the facts that he was in violation of the law at the time of his arrest and suffered no personal monetary loss or permanent injury as a result of the incident. Despite these obstacles, counsel prevailed against Officer Heller on each question put to the jury. His considerable efforts in litigating the case and the unsympathetic nature of his client should have been, but were not, considered by the District Court as indicative of the success of the case.

The Eighth Circuit, while affirming, observed that "were we the district court, we might have reached a

different result. . . . " Appendix p. A-6. It specifically noted that "the civil right Milton sought to vindicate was a significant issue contrary to the issue in *Farrar,*" suggesting the District Court misapplied *Farrar.* Appendix p. A-7. Judges McMillian and Morris Sheppard Arnold indicated they would grant rehearing on the matter. Appendix p. C-1. If the court's decision is not reversed, the message to police officers will be to proceed with business as usual and poor persons with meritorious claims against the government who cannot hire attorneys will be denied equal access to our justice system.

II. THE EIGHTH CIRCUIT ERRONEOUSLY DENIED PETITIONER COSTS AS A PREVAILING PARTY.

The Eighth Circuit erred in holding the District Court acted within its discretion when it denied an award of costs based on Petitioner's "nominal victory" and disproportionate result, relative to taxable costs of the litigation. The Eighth Circuit states that in determining whether to award costs, the district court considered the same factors mentioned in its attorney's fees discussion and also considered it significant that Petitioner was a prevailing party as to only one defendant. As discussed above, in considering these factors, the District Court misapplied the *Farrar* standard, and ignored the significant message of Petitioner's suit. In addition, the District Court attached undue importance to the number of defendants against whom Petitioner prevailed. Petitioner settled his suit against the hospital and won his case in court against one of the officers. That two of the officers were found not liable does not reflect on the established liability of Officer Heller. It does not make his acts any less

egregious or punishable. Counsel filed Petitioner's suit against all defendants in good faith. That the acts of some were found later, in a close question, not to rise to a level of liability does not take away from Petitioner's success against Officer Heller.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests the Court grant his Petition for Writ of Certiorari.

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APPENDIX

Appendix A. Milton v. Des Moines, Iowa, City of; Joanne Pollock, Individually and in official capacity, Defendants, Thomas Heller, Individually and in official capacity as Police Officer, Defendant-Appellee, Stephen Strawser, Individually and in official capacity as Police Officer, Defendant, No. 94-1533, February 8, 1995. (Published at *Milton v. Des Moines, Iowa*, 47 F.3d 944 (8th Cir. 1995)). A-1

Appendix B. Ruling Denying Application for Attorney Fees and Costs, United States District Court for the Southern District of Iowa, Central Division, No. 4-92-CV-80249, February 1, 1994. . . . . B-1

Appendix C. Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc, United States Court of Appeals for the Eighth Circuit, No. 94-1533, March 27, 1995. . . . . C-1

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-1533

Larry Milton, Plaintiff – Appellant, v. Des Moines, Iowa, City of; Joanne Pollock, Individually and in official capacity; Defendants, Thomas Heller, Individually and in official capacity as Police Officer, Defendant – Appellee, Stephen Strawser, Individually and in official capacity as Police Officer, Defendant.	*	Appeal from the United States District Court for the Southern District of Iowa. [PUBLISHED]

Submitted: October 11, 1994

Filed: February 8, 1995

Before WOLLMAN, Circuit Judge, HEANEY, Senior Circuit Judge, and HANSEN, Circuit Judge.

HANSEN, Circuit Judge.

Larry Milton appeals the district court's[1] denial of his application for attorney's fees pursuant to 42 U.S.C. § 1988 and for costs, originally in an amount of over $79,000, following a jury verdict of $1 against one defendant in his civil rights action. We affirm the district court's denial of attorney's fees and costs.

Larry Milton filed this action against three Des Moines police officers, the City of Des Moines, Iowa, and Broadlawns Medical Center on claims arising from an incident where the police injured Milton during an arrest. Milton claimed that the police used excessive force during the arrest by beating him with flashlights, that the police used racially discriminatory language, and that the city tolerated a pattern or practice of allowing police officers to use flashlights as a weapon, all in violation of Milton's constitutional rights. Milton also claimed that the city and the officers were guilty of negligence per se for violating police department regulations and that their actions amounted to assault and battery. Milton's claim against Broadlawns Medical Center, where Milton was treated after the incident, alleged wrongful disclosure of his medical records. Milton sought compensatory damages for his injuries, his physical and mental pain and suffering, his humiliation and emotional distress, and the deprivation of his constitutional rights. Milton also sought punitive damages and costs, including attorney's fees.

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[1] The Honorable Charles R. Wolle, Chief Judge, United States District Court for the Southern District of Iowa.

Before trial, Milton dismissed his claim for punitive damages and dismissed with prejudice his claims against Broadlawns Medical Center. The district court granted summary judgment on the negligence claim and bifurcated the claims against the city, which were subsequently dismissed. The remaining claims against the three officers for use of excessive force and assault and battery were tied to a jury. The evidence showed that during the arrest, Milton suffered blows to the head that resulted in medical bills totalling approximately $6,000. The jury found that one officer, Thomas Heller, was liable for use of excessive force and battery. The jury awarded Milton $1 in damages for past physical and mental pain and suffering caused by Thomas Heller. The jury returned verdicts against Milton and in favor of the other two officers.

Milton filed in the district court an application for attorney's fees pursuant to 42 U.S.C. § 1988 and for court costs. The district court denied the application, reasoning that while Milton was a prevailing party within the meaning of the statute, his moral victory and nominal award of damages were not of such great public significance as to justify an award of attorney's fees. For similar reasons, the district court denied Milton's request for costs. Milton appeals.

Milton challenges the district court's refusal to award attorney's fees under section 1988, which states in part as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, . . . the court, in its discretion, may allow the prevailing

> party, other than the United States, a reasonable attorney's fee as part of the costs.

Under the plain language of this provision, once a litigant is a "prevailing party," then the district court has discretion to award either a reasonable attorney's fee as part of the costs or no attorney's fee at all. "A plaintiff who wins nominal damages is a prevailing party under § 1988." *Farrar v. Hobby,* 113 S. Ct. 566, 573 (1992). There is no dispute that under *Farrar,* Milton is a prevailing party within the meaning of § 1988.

The district court's determination of whether to award attorney's fees and the amount of any such award is reversible only upon the showing of an abuse of discretion. *See Hendrickson v. Branstad,* 934 F.2d 158, 162 (8th Cir. 1991). "When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all." *Farrar,* 113 S. Ct. at 575 (internal citation omitted). In *Farrar,* the Court stated that when a plaintiff seeks compensatory damages, an award of nominal damages often only "highlights the plaintiff's failure to prove actual, compensable injury." *Id.* at 575. Circuit courts applying the holding of *Farrar* in this type of situation have found no abuse of discretion in a district court's decision to deny attorney's fees. *See, e.g., Carter v. Burch,* 34 F.3d 257, 265-66 (4th Cir. 1994) (no abuse of discretion to deny attorney's fees where plaintiff who sought compensatory damages received only nominal damages); *Cramblit v. Fikse,* 33 F.3d 633, 634-36 (6th Cir. 1994) (same).

We have held, however, that the *Farrar* opinion does not completely foreclose an attorney's fee award when a plaintiff receives only nominal damages. *See Jones v. Lockhart*, 29 F.3d 422 (8th Cir. 1994) (plaintiff awarded nominal compensatory damages, nominal punitive damages, and attorney's fees). The language of the *Farrar* opinion goes no farther than to say that in such situations "the only reasonable fee is *usually* no fee at all." 113 S. Ct. at 575 (emphasis added). The Court explained that "the technical nature of a nominal damages award . . . goes to the reasonableness of the fee award . . . [and] the most critical factor in determining the reasonableness of a fee award is the degree of success obtained." *Id.* at 574 (internal quotations and citations omitted).

In *Jones*, a prisoner's civil rights case, we allowed a fee award where the plaintiff recovered $1 as compensatory damages and $1 as punitive damages on an Eighth Amendment cruel and unusual punishment claim. 29 F.3d at 423. We found no abuse of discretion in the district court's decision to award attorney's fees, but we remanded with instructions for the district court to reduce the amount from $25,000 to $10,000. *Id.* at 424. We concluded that the district court did not abuse its discretion by awarding attorney's fees because "Jones's victory, though minimally compensated, was not pyrrhic or technical." *Id.* We reasoned that (1) while the discrepancy between the amount claimed and the amount received in *Jones* was great ($860,000 sought, $2 recovered), it paled in comparison to the type of discrepancy present in *Farrar* ($17,000,000 sought, $1 recovered); (2) the right to be free from cruel and unusual punishment was a significant issue as opposed to the business issue alleged in *Farrar*;

and (3) civil rights litigation serves an important public purpose. *Id. See also Farrar,* 113 S. Ct. at 578-79 (O'Connor, J., concurring). Additionally, and "[m]ost importantly, Jones was awarded punitive damages." *Id.*

In this case, the district court considered that Milton originally filed suit against the city, the medical center, and three police officers, and he sought punitive as well as compensatory damages for the alleged injuries and violations of his constitutional rights. The district court considered that Milton subsequently withdrew his claim for punitive damages, dismissed with prejudice his claims against Broadlawns Medical Center, and failed to prove his claims against two of the three police officers whom he alleged wrongfully injured him. The case against the city was ultimately dismissed. The district court also considered that Milton received only $1 in compensatory damages for past pain and suffering and recovered nothing for his other claims of damages. The district court acknowledged that a claim of excessive force is of great public importance, but also acknowledged that the message it sends is not new to members of the Des Moines police department. *Cf. Wilcox v. City of Reno,* 1994 WL 683014 (9th Cir. Dec. 8, 1994) (fees were awarded where the lawsuit uncovered an unconstitutional city policy, an officer was disciplined, and the city modified its use of force policy as a result of the litigation). Further, the district court found that Milton's racial discrimination claim was not an important factor to the jury in deciding this case because Milton recovered no judgment against the officer whom Milton alleged used racial slurs against him.

Although some of the same factors considered in *Jones* were also present in this case – i.e., the discrepancy between the amount claimed and the amount received was not as great as in *Farrar*, and the civil right Milton sought to vindicate was a significant issue contrary to the issue in *Farrar* – these factors do not dictate an award of attorney's fees. The district court retains its discretion and specifically considered all of the relevant factors of this case in making the fee determination. Were we the district court, we might have reached a different result; nevertheless, we cannot say that the district court abused its discretion here given its express consideration of all the factors listed above.

Milton also applied for costs against Thomas Heller pursuant to Federal Rule of Civil Procedure 54(d), which states that "costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs." Again, an abuse of discretion standard controls our review when the district court expressly denies an application for costs. *See Richmond v. Southwire Co.*, 980 F.2d 518, 520 (8th Cir. 1992) ("district court has substantial discretion in awarding costs to a prevailing party"). "An award of costs may be reduced or denied because the prevailing party obtained only a nominal victory, or because the taxable costs of the litigation were disproportionate to the result achieved." *Id.*

To determine whether to award costs, the district court considered the same factors mentioned in the attorney's fees discussion above and also considered it significant that Milton was a prevailing party as to only one defendant. Three defendants were found *not* liable to Milton; therefore, they were prevailing parties entitled to

costs against Milton. The district court determined that on balance, fairness required each party to bear his or her own costs and expenses. Again, although we might have decided that costs issue differently in the first instance, we are mindful that this is not the first instance. We cannot say that the district court abused its discretion.

Accordingly, we affirm the district court's denial of attorney's fees and costs in this action.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

LARRY MILTON, Plaintiff, vs. CITY OF DES MOINES, IOWA, a Municipality, JOANNE POLLOCK, THOMAS HELLER, and STEPHEN STRAWSER, Individually and in Their Official Capacity as Police Officers for the City of Des Moines, Iowa, Defendants.	)	NO. 4-92-CV-80249 RULING DENYING APPLICATION FOR ATTORNEY FEES AND COSTS (Filed Feb. 1, 1994)

The court has held a hearing and received lengthy briefs and arguments from counsel on the question whether plaintiff is entitled to payment of attorney fees and court costs from defendant Thomas Heller. A jury found plaintiff entitled to recover $1.00 in damages from Heller. The jury decided plaintiff did not prove his claims against defendants Joanne Pollock and Stephen Strawser. Before trial plaintiff had dismissed his claims against Broadlawns Medical Center of Des Moines. He has now dismissed his claims against the City.

The court concludes defendant Heller is not required to pay plaintiff attorney fees or court costs.

I. BACKGROUND.

Plaintiff commenced this action in 1992 against three individual Des Moines police officers, the City of Des Moines, and Broadlawns Medical Center. He contended that the police officers used excessive force, committed assault and battery, and made racial slurs while arresting him. He alleged that the City failed to train and supervise properly its police officers. He asserted that Broadlawns' personnel were at fault in disclosing unlawfully tests performed after he was hospitalized there as a result of the same incident. He alleged he had sustained serious personal injuries. He sought recovery of compensatory and punitive damages.

By the time this case was presented to a jury in December of 1993, plaintiff had dismissed without prejudice his claims against Broadlawns, dismissed his claims for punitive damages, and focused on the section 1983 allegation that the police officers had used excessive force during his arrest. Consequently, plaintiff's case presented to the jury was a pared-down version of the case originally filed in this court. By agreement of the parties, the court bifurcated the trial, submitting to the jury in the first phase only plaintiff's claims that individual officers seriously injured him by using excessive force and battery during his arrest on December 28, 1991.

In its special verdicts, the jury found that defendants Pollock and Strawser had not violated plaintiff's constitutional rights nor committed a battery on the plaintiff. The jury found that defendant Heller had violated plaintiff's constitutional rights and committed a battery on the plaintiff, but the jury found plaintiff entitled to recover

only the nominal damage sum of $1.00. The verdict was consistent with this court's charge to the jury that referred to a nominal damage award. No party objected to that instruction.

The controlling principles of law are clear. A civil rights plaintiff who recovers nominal damages in a section 1983 lawsuit is a prevailing party for purposes of eligibility to receive attorney fees under 42 United States Code section 1988. Moreover, court costs are ordinarily allowed to a prevailing party. But in *Farrar v. Hobby*, ___ U.S. ___, 121 L. Ed. 2d 494, 113 S. Ct. 566 (1992), the Court has clarified what a plaintiff in a civil rights action must accomplish to obtain payment of attorney fees. When a plaintiff "recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, . . . the only reasonable fee is usually no fee at all." *Id.* at 506. The technical or de minimis nature of a victory may be apparent when a plaintiff "asked for a bundle and got a pittance." *Id.* at 509 (O'Connor, J., concurring). Likewise, the allowance of court costs to a prevailing party is not an inexorable principle; the court may in its discretion direct otherwise depending on the equities of the case. *See* 6 Moore, Federal Practice ¶ 54.70, at 54-317 to 54-331.

II. ATTORNEY FEES.

Farrar v. Hobby and its progeny require that the court considering an attorney fee request must analyze the quality and quantity of the relief a plaintiff obtains. The court must compare what the plaintiff asked for with what the plaintiff received.

Applying the new *Farrar* yardstick, the court concludes plaintiff's success in this case was marginal. He dismissed his claim against Broadlawns Medical Center long before trial. He abandoned his claim for punitive damages shortly before the trial began. He failed to prove his claims against two of the three police officers he alleged had wrongfully injured him. He presented to the jury claims for past medical expenses, future medical expenses, past physical and mental pain and suffering, and future physical and mental pain and suffering. The jury awarded him nothing on three of those items and the nominal amount of $1.00 for past physical and mental pain and suffering. He has dismissed his claim against the City of Des Moines. Like the plaintiff in *Farrar*, plaintiff obtained little more than the moral satisfaction of knowing a federal jury decided one of the three police officers had used excessive force while lawfully arresting him. *Compare Wilkes v. Reyes*, 5 F.3d 412 (9th Cir. 1993) (possible, but more difficult in light of *Farrar*, for plaintiff's counsel to recover attorney fees in an excessive force case against police officer; $1.00 in nominal damages awarded); *Willis v. City of Chicago*, 999 F.2d 284, 290 (1993) (attorney fee award reversed where civil rights litigant awarded $1.00 in nominal damages); *Kjorlie v. Lundin*, 830 F. Supp. 1386, 1388 (D. Kan. 1993) (civil rights plaintiffs awarded one dollar nominal damages against both defendants fell "far short of the relief" they elected to seek and were not entitled to attorney fees under *Farrar*).

The plaintiff contends the verdict for $1.00 against police officer Heller was of great public significance, sending a message to Des Moines police officers that they

may not use excessive force in arresting African American citizens. That message is important and should not be lost on any law enforcement officer. Excessive force may not be used on any citizens regardless what may be their race, religion, national origin, or other personal characteristics. But that message is not new. The City of Des Moines itself has been required to pay persons injured by excessive force used by its officers after arresting persons; one example is the case of *Curtis v. City of Des Moines*, No. 4-89-CV-80340, decided in 1992 (judgment for plaintiff for actual damages and attorney fees due to excessive force used by two Des Moines police officers).

That plaintiff is an African American was not an important factor in the jury's decision. Plaintiff alleged that Officer Pollock, not Heller, had used racial epithets; plaintiff did not prove that Pollock violated his constitutional rights.

This case really presented no novel legal issues nor complicated factual circumstances. The court's instructions on the law were not unique and required no extended legal research nor ingenuity.

Without question plaintiff's counsel prepared this case well and presented it effectively to the jury. Plaintiff and other persons in his firm performed the services listed in his itemized statement and incurred the expenses there itemized. The affidavits presented in support of plaintiff's application for attorney fees correctly emphasize the formidable task plaintiff's attorney faced in seeking to obtain a judgment for substantial damages. Those affidavits, essentially amicus briefs, overstate the difficulty personal injury claimants have in this district in

obtaining counsel to represent them in asserting civil rights claims. Plaintiff has not proved that an attorney fee in this case is essential to enable future victims to obtain counsel. Nothing in this record suggests that plaintiff's counsel was reluctant to represent him. Plaintiff's counsel never explained by affidavit or otherwise what fee agreement he had with plaintiff. Plaintiff's counsel did mention to the court before trial, in arguing for a continuance of trial that was subsequently granted, that he was representing plaintiff *pro bono*. Counsel representing a civil rights plaintiff *pro bono* is not disqualified from obtaining attorney fees if the defendant is obligated to pay reasonable attorney fees. But by *Farrar* standards plaintiff Larry Milton's [sic] But by *Farrar* standards this is the usual nominal damage case; plaintiff is entitled to no fee at all.

The plaintiff's recovery of $1.00 from one of the several persons plaintiff sued does not constitute a degree of success requiring defendant Thomas Heller to pay attorney fees as part of the judgment.

III. COURT COSTS.

In determining the assessment of court costs, the court has considered all of the factors mentioned here with regard to attorney fees. Moreover, the court takes into consideration that three of the other defendants were also prevailing parties; Joanne Pollock, Stephen Strawser, and Broadlawns Medical Center were not found liable to the plaintiff. If the court were to assess all or part of the costs against the defendant Thomas Heller it would also assess against the plaintiff part or all of the costs incurred by other defendants. On balance, the court concludes that

in fairness all parties should bear their own costs and expenses and none should be required to reimburse another for their attorney fees, costs, and expenses incurred in this litigation.

The plaintiff's application for attorney fees and costs is denied. The judgment shall remain as already entered upon the jury's verdict.

IT IS SO ORDERED.

Dated this 1st day of February, 1994.

/s/ Charles R. Wolle
CHARLES R. WOLLE, JUDGE
UNITED STATES
DISTRICT COURT

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 94-1533SIDM	*	
	*	
Larry Milton,	*	
appellant,	*	Order Denying
	*	Petition for Rehearing
vs.	*	and Suggestion for
	*	Rehearing En Banc
Thomas Heller, Individually and in official capacity as Police Officer,	*	
	*	
	*	
Appellee.	*	
	*	

The suggestion for rehearing en banc is denied. Judge McMillian and Judge Morris Sheppard Arnold would grant the suggestion for rehearing en banc.

The petition for rehearing by the panel is also denied.

March 27, 1995

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
JUL 26 1995
OFFICE OF THE CLERK

(2)

No. 94-2124

In The

Supreme Court of the United States

October Term, 1995

LARRY MILTON,

Petitioner,

v.

THOMAS HELLER, Individually and in his official capacity as Police Officer,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER THE DENIAL OF FEES WAS PROPER AND WARRANTED UNDER *FARRAR V. HOBBY* WHERE A CIVIL RIGHTS PLAINTIFF SEEKING COMPENSATORY DAMAGES UNDER 42 U.S.C. § 1983 WAS AWARDED ONLY NOMINAL DAMAGES AGAINST ONE OF FIVE DEFENDANTS?

II. WHETHER THE COURT PROPERLY DENIED AN AWARD OF COSTS TO THE PLAINTIFF WHERE HE RECOVERED ONLY NOMINAL DAMAGES AGAINST ONE OF FIVE DEFENDANTS?

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No. 94-2124

In The

Supreme Court of the United States

October Term, 1995

LARRY MILTON,

Petitioner,

v.

THOMAS HELLER, Individually and in his official capacity as Police Officer,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

Respondent THOMAS HELLER respectfully opposes the Petition for Writ of Certiorari to review the order denying the Petition for rehearing and suggestion for rehearing en banc entered by the United States Court of Appeals for the Eighth Circuit on March 27, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, which the Petitioner seeks to review, is reported at 47 F.3d 944 and is contained in Petitioner's

Appendix A. The Ruling of the United States District Court for the Southern District of Iowa Denying Application for Attorney Fees and Costs is unreported and is contained in Petitioner's Appendix B. The Order of the United States Court of Appeals for the Eighth Circuit Denying Petition for Rehearing and Suggestion for Rehearing En Banc is contained in Petitioner's Appendix C.

JURISDICTION

Jurisdiction in the United States District Court below was premised on 28 U.S.C. §1343(3) based on 42 U.S.C. §1983 and §1988. The jurisdiction of the Eighth Circuit Court of Appeals was based upon 28 U.S.C. §1291. The Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1). Certiorari is unwarranted in this matter because the decision of the Eighth Circuit Court of Appeals is directly in accord with this Court's decision in *Farrar v. Hobby*, ___ U.S. ___, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992). The circuit courts of appeal are in accord on the issue of denial of attorney fees in nominal damage cases under similar circumstances.

STATUTORY PROVISIONS

The text of 42 U.S.C. Section 1988(b) 1994 is included in the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

On the evening of December 28, 1991, Larry Milton was arrested for intoxication. When he refused handcuffing, an altercation occurred. Two starkly different versions of what happened next were presented. Milton claimed that he was struck repeatedly with a flashlight without provocation by three police officers, Sergeant Pollock, Officer Heller and Officer Strawser, and that Sergeant Pollock had used racial epithets and threatened Milton. The officers testified that Milton was intoxicated and high on drugs, that he resisted handcuffing, and that he fought and grabbed one officer's gun. The officers admitted that Milton was then struck in the head with a flashlight by Officer Heller.

On April 3, 1992, Larry Milton filed a Complaint naming as Defendants the City of Des Moines, Iowa, and three police officers, Sergeant Joanne Pollock, Thomas Heller and Stephen Strawser. Plaintiff brought the following damage claims: (1) Under 42 U.S.C. §1983 against the officers for use of excessive force in violation of Plaintiff's constitutional rights; (2) Under 42 U.S.C. §1983 against the City of Des Moines for maintaining a pattern and practice of allowing police officers to use flashlights as weapons, and failing to properly train and supervise officers by allowing them to use flashlights as weapons; (3) For negligence per se against the officers and City of Des Moines for alleged violations of Des Moines Police Department Regulations, by using unnecessary force and by using an "unauthorized" auxiliary weapon, namely, a flashlight; and (4) For assault and battery, directly against the officers, and against the City of Des Moines for statutory liability as employer of the officers. In addition,

Plaintiff joined in the same lawsuit a claim against Broadlawns Medical Center for allegedly violating Plaintiff's rights by disclosing the results of drug and alcohol tests performed on Milton following the incident. Plaintiff dismissed his lawsuit against Defendant Broadlawns Medical Center in 1992.

Plaintiff initially sought both compensatory and punitive damages against the police officers. He sought compensatory damages from the City of Des Moines.

The Defendant City and police officers were granted summary judgment on the negligence claims in September of 1993. On December 1, 1993, eight days prior to trial, punitive damage claims against the police officers were dismissed by plaintiff. The claims against the City were bifurcated and later dismissed.

The case proceeded to trial beginning December 9, 1993 before a jury on the claims of excessive force and battery against the three police officers. Following trial, a jury returned a verdict in favor of Defendants Sergeant Pollock and Officer Strawser, and a verdict for $1.00 in nominal damages against Defendant Officer Heller, under the state law claim of battery and excessive force under 42 U.S.C. §1983.

Plaintiff filed an application for attorney fees and costs on December 30, 1993. Defendant Heller resisted this application. The district court denied the Plaintiff's application for attorney fees and costs.

The Plaintiff appealed the denial of attorney fees and costs to the Eighth Circuit Court of Appeals. The Court of Appeals affirmed the District Court's ruling, finding no

abuse of discretion. The Plaintiff's Petition for Rehearing and Suggestion for Rehearing En Banc was denied on March 27, 1995.

REASONS FOR DENYING THE PETITION

I. WHETHER THE DENIAL OF FEES WAS PROPER AND WARRANTED UNDER *FARRAR V. HOBBY* WHERE A CIVIL RIGHTS PLAINTIFF SEEKING COMPENSATORY DAMAGES UNDER 42 U.S.C. §1983 WAS AWARDED ONLY NOMINAL DAMAGES AGAINST ONE OF FIVE DEFENDANTS?

In its ruling denying the Petitioner's application for attorney's fees and costs, the District Court noted that "by *Farrar* standards this is the usual nominal damage case", and thus plaintiff was entitled to no fee. The District Court was referring to this Court's ruling in *Farrar v. Hobby*, ___ U.S. ___, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992), where this Court held that "When a plaintiff 'recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, . . . the only reasonable fee is usually no fee at all.' "

In *Farrar v. Hobby*, ___ U.S. ___, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992), this Court decided that a plaintiff who is awarded nominal damages is a "prevailing party" under 42 U.S.C. §1988, but also stated that "the 'technical' nature of a nominal damages award bear[s] on the propriety of fees awarded under §1988." 113 S.Ct. at 574. This Court reaffirmed in *Farrar* that " . . . 'the most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.' " *Id.* at 574.

This Court went on to address the entitlement to fees of a plaintiff seeking compensatory damages for violation of his civil rights:

> [I]n some circumstances, even a plaintiff who formally 'prevails' under §1988 should receive no attorney's fees at all. A plaintiff who seeks compensatory damages but receives no more than nominal damages is often such a prevailing party. . . . In a civil rights suit for damages, however, the awarding of nominal damages also highlights the plaintiff's failure to prove actual, compensable injury. (citation omitted) Whatever the constitutional basis for substantive liability, damages awarded in a §1983 action 'must always be designed "to **compensate injuries** caused by the [constitutional deprivation." ' (citation omitted) (emphasis in original) **When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief . . . the only reasonable fee is usually no fee at all.** (Emphasis added)

Id. at 575.

The District Court was following this mandate when it analyzed the quality and quantity of the relief obtained by the plaintiff and found that the plaintiff's success was "marginal." The Court observed that there were no novel legal issues or complicated factual circumstances. The District Court considered the factors set forth in Justice O'Connor's concurring opinion in *Farrar*, exercised his discretion and denied the application for attorney's fees.

Such a determination properly remains within the discretion of the district court. "This allocation of decisionmaking makes sense. The district court is in the best position to ascribe a reasonable value to the lawyering it has witnessed and the results that the lawyering has achieved." *Wilcox v. City of Reno*, 42 F.3d 550, 555 (9th Cir. 1994).

This allocation of decisionmaking was clear in the legislative history of 42 U.S.C. §1988, which provides that "the Court, *in its discretion*, may allow the prevailing party . . . a reasonable attorney's fee. . . . " House Report 8 provides in part as follows:

> [A] key feature of the bill is its mandate that fees are only to be allowed *in the discretion* of the court. Congress has passed many statutes *requiring* that fees be awarded to a prevailing party. Again, the Committee adopted a more moderate approach here by leaving the matter to the discretion of the judge, guided of course by the case law interpreting similar attorney's fee provisions.

H.R. Rep. 94-1558 (1976)

The district court noted that nothing in this case distinguishes it in any meaningful way from *Farrar* for purposes of determining attorney's fees. Despite the newspaper editorials and extensive media coverage surrounding this case, this lawsuit did not result in a finding of any unconstitutional policy nor did it actually spark any change of policy or legislation. *Cf. Wilcox v. City of Reno*, 42 F.3d 550, 556-557 (9th Cir. 1994), *Koopman v. Water District No. 1 of Johnson County, Kansas*, 41 F.3d 1417, 1421 (10th Cir. 1994). It may be interesting to note

that the newspaper articles cited by the Plaintiff are prior to or during trial of this matter.

No punitive damages were awarded in this case. *Cf. Jones v. Lockhart*, 29 F.3d 422, 424 (8th Cir. 1994).

Although the case began with newspaper headlines and enlarged photographs screaming of plaintiff's allegations of police brutality, it ended with nothing more than a verdict of $1.00 against one of several defendants. As such, it is the usual nominal damage case.

Petitioner argues that he did not seek an enormous sum of money, that the "vindication of his constitutional rights" was his most important goal, and was achieved. This argument is totally without merit.

Plaintiff offered into evidence approximately $6,000 in medical bills. He displayed his injuries to the jury and offered into evidence numerous photographs illustrating his condition following the incident. He testified as to continued pain and suffering. Plaintiff did not ask the jury to award nominal damages of $1.00 – Plaintiff sought compensatory damages.

Petitioner's counsel's attempt to justify his entitlement to fees by claiming that he was not seeking a large amount of money does not change the mandate of *Farrar*. *See Romberg v. Nichols*, 48 F.3d 453, 455 (9th Cir. 1995). The Eighth Circuit properly affirmed the denial of attorney's fees under these circumstances. Other United States Courts of Appeals which have considered whether an award of attorney's fees is warranted in a nominal damage case interpret *Farrar* uniformly. When a plaintiff seeks compensatory damages for a violation of his or her civil

rights and receives only nominal damages, the only reasonable fee is no fee at all. *See Carter v. Burch*, 34 F. 3d 257 (4th Cir. 1994), *Cramblit v. Fikse*, 33 F. 3d 633 (6th Cir. 1994), *Cartwright v. Stamper*, 7 F.3d 106 (7th Cir. 1993), *Willis v. City of Chicago*, 999 F.2d 284 (7th Cir. 1993), *Romberg v. Nichols*, 48 F.3d 453, 455 (9th Cir. 1995).

The courts of appeal also seem to agree that when the verdict serves as an impetus to a change in policy an award of attorneys fees may be warranted. *See Wilcox v. City of Reno*, 42 F.3d 550, 556-577 (9th Cir. 1994), *Koopman v. Water District No. 1 of Johnson County, Kansas*, 41 F.3d 1417, 1421 (10th Cir. 1994). Likewise, when punitive damages are awarded in addition to the nominal damage award, some amount of attorney's fees may be justified. *See Jones v. Lockhart*, 29 F.3d 422, 424 (8th Cir. 1994).

As stated above, this case did not involve any change in policy or a punitive damage award. In this action the claims relating to allegations of unconstitutional City policies were bifurcated and later dismissed. The punitive damage claims were dismissed prior to trial. In sum, there is no meaningful distinction between this case and *Farrar v. Hobby*. The courts below correctly determined that the only reasonable fee in this matter is no fee at all.

II. WHETHER THE COURT PROPERLY DENIED AN AWARD OF COSTS TO THE PLAINTIFF WHERE HE RECOVERED ONLY NOMINAL DAMAGES AGAINST ONE OF FIVE DEFENDANTS?

Generally, costs are allowed to a prevailing party, unless the court otherwise directs. Rule 54(d) Federal

Rules of Civil Procedure. The court is vested with discretion under Rule 54(d). Wright, Miller & Kane, *Federal Practice and Procedure*: Civil 2d §2668. The court may grant, deny or apportion costs in the exercise of its discretion. *Id.*

In her concurring opinion in *Farrar*, Justice O'Connor suggests that since fees awarded under 42 U.S.C. §1988 are only awarded as a part of costs, they should be denied under the same circumstances: "Just as a pyrrhic victor would be denied costs under Rule 54(d), so too should it be denied fees under §1988". *Farrar*, ___ U.S. ___, 113 S.Ct. 566, 578, 121 L.Ed.2d 494 (1992).

The District Court considered the same factors in determining assessment of court costs that he did concerning attorney's fees. In addition, he noted that three other defendants were prevailing parties against the plaintiff, and that if costs were assessed against defendant Heller they would also be assessed, as to the other defendants, against the plaintiff. He concluded that in fairness all parties should bear their own costs and expenses. The denial of costs was an appropriate exercise of discretion by the Court.

CONCLUSION

Based on the above stated facts, law and reasoning, the Respondent respectfully requests that this Court deny the Plaintiff's Petition for Writ of Certiorari and assess costs to the Plaintiff.

Respectfully submitted,

SUSAN A. LOW
Assistant City Attorney
BRUCE E. BERGMAN
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